

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TAMMIE RAMSELL)	
Claimant)	
VS.)	
)	
MCKEEVER'S COUNTRY MART)	Docket No. 220,849
Respondent)	
AND)	
)	
BENCHMARK INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

The claimant and the respondent and its insurance carrier appealed the June 22, 1999 Award entered by Administrative Law Judge Robert H. Foerschler. The Appeals Board heard oral argument in Kansas City, Kansas, on October 19, 1999.

APPEARANCES

Alvin E. Witwer of Kansas City, Kansas, appeared for the claimant. Michael J. Haight of Overland Park, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a back injury that occurred on January 1, 1997. Averaging a 29 percent task loss with a 42 percent wage loss, the Judge found that claimant had a 35½ percent permanent partial general disability.

Claimant contends Judge Foerschler erred by failing to find that claimant has a 12 percent whole body functional impairment and by finding a work disability of less than 50 percent.

Conversely, respondent and its insurance carrier contend the Judge erred by failing to find that claimant refused to perform accommodated work that paid 90 percent of her pre-injury wage and thereby limiting claimant's award to the three percent functional impairment rating provided by Dr. Don B. W. Miskew.

The only issue before the Appeals Board on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. The parties stipulated that Ms. Tammie Ramsell, who is 5' 3" and weighs 134 pounds, injured her back on January 1, 1997, while lifting a box of produce trimmings. The parties stipulated that the accidental injury arose out of and in the course of Ms. Ramsell's employment as the produce manager with McKeever's Country Mart (McKeever's) in Louisburg, Kansas.
2. The next day, January 2, 1997, Ms. Ramsell sought treatment from her personal physician. When her personal physician requested permission for an MRI, the grocery store's insurance carrier referred Ms. Ramsell to board certified orthopedic surgeon Don B. W. Miskew, M.D.
3. Dr. Miskew began treating Ms. Ramsell in January 1997 and diagnosed a lumbar strain for which he prescribed medication, an epidural block, physical therapy, and a back brace. During the course of treatment, Dr. Miskew requested an MRI. The results of that MRI indicated a small central bulging disk between the fourth and fifth lumbar vertebrae, a minimal bulge between the fifth lumbar and first sacral vertebrae, and some early degenerative disk disease at both of those levels. Using the fourth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA Guides), the doctor rated Ms. Ramsell as having a three percent whole body functional impairment.
4. Dr. Miskew found that Ms. Ramsell magnified her symptoms but nevertheless in May 1997 gave her permanent work restrictions of no lifting over 10 pounds, no overhead work, no pushing or pulling, no crawling, no bending, and no stooping. In his May 14, 1997 report he wrote, in part:

At this point I have nothing further to offer this lady. I feel a great deal of her symptomatology is due to symptom magnification. I don't think she will respond to surgery. I feel she has reached maximum medical improvement. I feel she can work at permanent light duty restrictions of no lifting over 10 lbs., as she feels 20 lbs. is too heavy. No overhead work, no pushing or pushing [sic], no crawling, bending or stooping. I have given her #60 Flexeril

tablets, 1 q 8 h to use for muscle relaxant. I have dismissed her from my care.

When he was deposed in April 1999, Dr. Miskew was clear that absent the symptom magnification, Ms. Ramsell would have no permanent medical restrictions. But in his letter to respondent's attorney Michael J. Haight dated May 3, 1999, Dr. Miskew stated that Ms. Ramsell should limit her lifting to 50 pounds due to her physical condition.

5. At her attorney's request, in November 1997 Ms. Ramsell saw occupational medicine physician Zita J. Surprenant, M.D., for an evaluation. Finding no symptom magnification, Dr. Surprenant diagnosed chronic low back pain with intermittent left lower extremity radicular complaints with MRI documented L4-5 herniation. The doctor rated Ms. Ramsell as having a 10 percent whole body functional impairment according to the *AMA Guides*. Further, the doctor recommended trying a TENS unit, non-narcotic pain medicine, and continuing her stretching and walking programs for the pain and a CT myelogram to study the L4-5 disk area. At the time of the evaluation, the doctor believed that Ms. Ramsell should limit her lifting to 10 pounds; avoid repetitive bending, stooping, or crawling; and change posture as needed every hour.

6. After a prehearing settlement conference, Judge Foerschler appointed Daniel M. Downs, M.D., to evaluate Ms. Ramsell and provide an opinion of her functional impairment rating. The doctor examined Ms. Ramsell in July 1998 and found that she had a 12 percent whole body functional impairment according to the *AMA Guides*. Additionally, the doctor believed that Ms. Ramsell should avoid repetitive bending, repetitive stooping, prolonged standing, and sitting without the ability to change positions; and limit occasional lifting to not more than 25-30 pounds from knee to waist and not more than 10 pounds over chest level.

7. After Dr. Miskew released Ms. Ramsell to return to work in April 1997, McKeever's tried to accommodate her by offering several light duty jobs. The last job McKeever's offered Ms. Ramsell was as a checker that would pay at least 90 percent of her pre-injury wage. Despite the modifications that McKeever's made to the checker position, according to Ms. Ramsell, she tried performing that job but couldn't tolerate the pain that she attributed to twisting and bending. Ms. Ramsell testified:

Q. (Mr. Haight) Were you lifting things heavier than you should have been?

A. (Ms. Ramsell) No, but in order to scan an item you have to pick it up from Point A, scan it, and put it down here and at that point in time twisting the very tiniest bit caused me great pain. And there was a rack of cigarettes behind my register that went from way up yonder clear to the floor and every customer that came through my aisle needed a pack of cigarettes. So, therefore, I was doing a lot of bending and stretching and it just -- I was in

miserable pain and she sent me home and set up a meeting with Allen [sic] McKeever.

8. When considering the entire record, including the opinions of doctors Miskew and Surprenant, the Appeals Board finds that the checker position was an appropriate job that accommodated Ms. Ramsell's medical restrictions. Further, based upon the testimony of former McKeever's Louisburg store manager Virginia Sue Knop and McKeever's chief financial officer Jeffrey D. Blobaum, the Appeals Board finds that Ms. Ramsell did not want to work as a checker because she felt it was beneath the status of a produce manager.

9. Ms. Ramsell last worked for McKeever's in approximately April 1997. When she last testified in April 1999, Ms. Ramsell had not worked for any other employer since McKeever's but she had just started a course in computer repair that began in March 1999.

10. The Appeals Board is not persuaded that one doctor's opinion of functional impairment is more persuasive than the others. Therefore, the Appeals Board averages the ratings and finds that Ms. Ramsell has an eight percent whole body functional impairment as a result of the January 1, 1997 injury to her back.

CONCLUSIONS OF LAW

1. Because the Appeals Board finds and concludes that Ms. Ramsell did not put forth a good faith effort to perform the checker job that McKeever's offered her that would have returned her to within 90 percent of her pre-injury average weekly wage, the permanent partial general disability rating should be reduced to the eight percent functional impairment.

2. Because Ms. Ramsell's injuries comprise an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1996 Supp. 44-510e. That statute provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk¹ and Copeland.² In Foulk, the Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In Copeland, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that workers' post-injury wages should be based upon their ability rather than their actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injury.

If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .³

3. Because Ms. Ramsell failed to make a good faith effort to perform the checker job, the wage from that job should be imputed for purposes of the permanent partial general disability formula. Because the checker position would have paid Ms. Ramsell at least 90 percent of her pre-injury average weekly wage, her permanent partial general disability is limited to her eight percent functional impairment rating.

4. The Appeals Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Appeals Board modifies the June 22, 1999 Award and reduces the permanent partial general disability rating from 35½ percent to eight percent.

Tammie Ramsell is granted compensation from McKeever's Country Mart and its insurance carrier for a January 1, 1997 accident and resulting disability. Based upon an average weekly wage of \$600.69, Ms. Ramsell is entitled to receive 13 weeks of temporary total disability benefits at \$338 per week, or \$4,394, followed by 33.20 weeks of benefits at \$338 per week, or \$11,221.60, for an eight percent permanent partial general disability, making a total award of \$15,615.60, which is all due and owing less any amounts previously paid.

¹ Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

² Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

³ Copeland, p. 320.

The Appeals Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Alvin E. Witwer, Kansas City, KS
Michael J. Haight, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director